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IN THE

Supreme Court of the United States

RANDALL W. HANSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICI CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND MANUFACTURERS ALLIANCE/MAPI, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a national non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and filing amicus curiae briefs in this and other federal courts promoting a limited and accountable government and opposing overreaching by those administrative agencies and courts which act contrary to the plain meaning of the language chosen by Congress in the substantive statutes at issue.[1]

WLF participated as amicus curiae in this case below as well as in numerous other cases which, like the present case, raise the important issue of whether proof of *mens rea* in the criminal application of environmental statutes is required. *See, e.g., United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied,* 513 U.S. 1128 (1995); *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000).

The Manufacturers Alliance/MAPI, Inc. is a non-profit policy research organization supported by more than 500 manufacturing companies from a broad range of industries. Its members range in size from relatively small, single-product manufacturers to very large, highly diversified manufacturers with annual sales revenues

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[1] This brief is being filed with the consent of all parties. Letters of consent are on file with the Clerk of this Court. Pursuant to Sup. Ct. R. 37.6, amici hereby affirm that no counsel for either party authored any part of this brief, and that no person or entity other than WLF and its counsel provided financial support for preparation or submission of this brief.

exceeding one billion dollars. Its mission is to assist its members in improving productivity by stimulating investment in technology and by encouraging innovations, thereby enhancing its members worldwide competitiveness.

Of particular relevance to this case, the Manufacturers Alliance's Environmental Management Council promotes the exchange of practical and timely information concerning the executive management of manufacturers' environmental, health, and safety programs, and encourages "best practices" in complying with applicable regulatory requirements.

Amici will provide the Court with a broader perspective to this case than that provided by the parties and will present additional reasons why this Court should grant the petition, namely, (1) the unwarranted and unlawful expansion of the "responsible corporate officer" doctrine to obtain felony convictions for specific intent crimes under environmental statutes, and (2) the counterproductive and undesirable effects that such expansion likely will have on the governance of firms with industrial operations.

INTRODUCTION AND STATEMENT OF THE CASE

This case pushes the envelope of the "responsible corporate officer" doctrine far beyond any case decided since this Court articulated the doctrine in *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975). In *Park* and *Dotterweich*, the Court affirmed misdemeanor convictions of company officers under criminal provisions of the food safety law

from which Congress intentionally omitted any *mens rea* requirement and under which only light jail terms are possible. In the present case, the petitioner was convicted of felonies under criminal provisions of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(c)(2)(A), and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6928(d)(2)(A) and (e), both of which require "knowing" conduct on the part of the defendant, and for which substantial prison terms of several years are not only possible, but, as this case demonstrates, likely to be imposed.

This case thus presents the question of whether the court of appeals so misconstrued and misapplied this Court's *Park/Dotterweich* responsible corporate officer doctrine by greatly expanding it to allow its use to support felony convictions under statutes requiring actual knowledge of the offense and for which substantial prison terms are provided.

Christian Hansen, father of the petitioner, was the founder and president of Hanlin Group, Inc. (Hanlin). In 1991, the financially troubled company was forced into bankruptcy under Chapter 11. A year later, the father convinced his son, petitioner Randall W. Hansen, who lived with his family in New Jersey, to temporarily serve as Executive Vice President of LCP Chemicals, a division of Hanlin, because the post had become vacant. Pet. App. 2a. Randall Hansen's mission was to develop "the business and financial plans necessary to turn around the financial condition of the chemicals business." Pet. App. 6a. One of LCP's assets was its Brunswick, Georgia facility, which produced a variety of commercially vital chemical compounds.

The Brunswick facility had experienced several environmental problems that predated Randall Hansen's hiring. The environmental problems revolved around the facility's wastewater treatment system. The facility was authorized to discharge wastewater to a nearby creek after treatment in the facility's wastewater treatment system. Pet. App. 3a. The capacity of the wastewater treatment system, however, was not always sufficient to keep up with the volume of wastewater generated by the facility's operations. Accordingly, LCP's discharge permit authorized the facility to temporarily hold wastewater on the floors of two large "cellrooms," pending treatment. Pet. App. 4a.

With the onset of Hanlin's bankruptcy in 1991, "funds for maintenance, repair, and environmental compliance were restricted." Pet. App. 6a. With almost no funds for maintenance or repair, the wastewater treatment system broke down frequently. When this occurred, the facility accumulated excessive levels of wastewater in the cellrooms and occasionally had to discharge untreated wastewater to the environment, in violation of the facility's CWA permit. LCP reported such unpermitted discharges to the Georgia Environmental Protection Division ("EPD"), which administered the permit. Pet. App. 10a.

After being told of the unpermitted discharges by the plant manager, Randall Hansen "attempted to find funds [for plant repairs] by selling excess equipment and reducing the payroll but the funds remained limited." Pet. App. 6a. He also requested the Hanlin Board of Directors, the bankruptcy creditor's committee and the court for funds to address the wastewater problem, but those

requests were denied. *Id.* Randall Hansen made efforts to sell the plant to a company with resources to correct the problems, but those efforts eventually failed and the plant closed in February 1994.

Over *four years* later, Randall Hansen was indicted along with his father and two other plant managers and charged with: (1) knowingly discharging pollutants in violation of the CWA permit; (2) knowingly storing, treating or disposing of hazardous waste without a RCRA permit; (3) through the RCRA violations, knowingly endangering employees at the plant, such that they were placed in imminent danger of death or substantial harm; and (4) conspiring with other officers of Hanlin to violate these environmental laws.

At trial, the defense vigorously contested the prosecution's claim that Randall Hansen had sufficient actual knowledge to be charged with "knowing endangerment." Only one employee testified about an actual injury relating to exposure to wastewater. The employee claimed that sometime between 1986 and 1993 (he could not even remember what year in that seven-year period of time), he had fallen into a sump of the wastewater and suffered minor chemical burns. The witness testified that he simply showered off, never sought medical attention, *and never reported the incident to Hanlin or LCP management.*[2]

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[2] By adding a "knowing endangerment" count under RCRA, the prosecution was taking what was akin to a worker safety violation under the Occupational Safety and Health Act (OSHA), for which the maximum sentence is six months imprisonment in the case of a fatality resulting from a wilful violation of an OSHA regulation (29

At the close of evidence, the trial judge instructed the jury regarding the various elements of the CWA and RCRA violations charged. Over the objections of petitioner's counsel, the trial judge added to his instructions on the RCRA charges a summary proposed by the prosecution. The summary stated that the jury could convict the individual defendants, including Randall Hansen, if the jury found:

> *First*: that the Defendant under consideration had a responsible relationship to the violation – that is, that it occurred under his area of authority and supervisory responsibility;
> *Second*: that the Defendant had the power or the capacity to prevent the violation; and
> *Third*: that the Defendant acted knowingly in failing to prevent, detect or correct the violation.

Pet. App. 95a.

The prosecution cited *United States v. Park* as its principal authority for giving this instruction. Pet. App. 100a. The trial judge, over the renewed objection of the petitioner's counsel, instructed the jury that this summary could be used to convict the petitioner of Count 34, "knowing endangerment." Pet. App. 53a. Randall Hansen was convicted on all counts, including knowing endangerment. As a first offender, model citizen, and father of two young children, he was sentenced to the draconian sentence of 46 months of incarceration.

U.S.C. § 666(e)), and turning it into a knowing endangerment RCRA violation, where no fatality or serious injury resulted, for which the maximum sentence is 15 years

Amici shall focus their brief on the "knowing endangerment" count because it dramatically illustrates the fatal flaw of applying the responsible corporate officer doctrine to a specific intent felony offense under RCRA.[3]

SUMMARY OF ARGUMENT

Our system of criminal law is founded on the fundamental principle that to convict a defendant of a crime and deprive him of his liberty, the government must establish, beyond a reasonable doubt, that the defendant possessed a criminal state of mind, or *mens rea*, and that there is sufficient evidence to prove such knowledge beyond a reasonable doubt. The responsible corporate officer doctrine, articulated by this Court in *Dotterweich* and *Park,* is, and must remain, a very narrow exception to this rule. The rule essentially relieves prosecutors of the *mens rea* element of proof for violations of what are referred to as "public welfare legislation." Under this doctrine, a person may be held criminally liable for wrongful conduct of others within the corporate infrastructure by virtue of having held a responsible position within the corporation. Both *Dotterweich* and *Park* involved misdemeanor violations of the federal food safety law for which the defendants were not imprisoned. Neither case, however, affords federal prosecutors a short cut to felony convictions for environmental crimes carrying

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[3] Amici note that a separate joint petition has been filed by Christian Hansen and Alfred Taylor in this case. *Hansen v. United States*, 70 U.S.L.W. 3497 (U.S. Jan. 24, 2002) (No. 01-1112). Amici submit that if Randall Hansen's petition is granted, then the companion joint petition should also be granted because it raises similar issues.

lengthy prison terms.

In the present case, the Eleventh Circuit affirmed the Petitioner's felony conviction for "knowing endangerment" under RCRA, endorsing the government's use of the responsible corporate officer doctrine to supplant an express *mens rea* requirement. To be convicted of knowing endangerment, RCRA requires proof that the defendant had "actual awareness" that his conduct could cause death or severe injury to employees and expressly prohibits attribution of knowledge to satisfy this *mens rea* requirement.

Nevertheless, the Eleventh Circuit affirmed Randall Hansen's conviction for knowing endangerment simply because he had the authority to prevent the violation and failed to do so. Neither *Dotterweich* and *Park* contemplate use of the responsible corporate officer doctrine to obtain a felony conviction of a specific intent offense such as "knowing endangerment."

If allowed to stand, the Eleventh Circuit's decision would work a manifest injustice and violate due process by permitting the incarceration of individuals for several years without having to show sufficient evidence to prove *mens rea*. The decision would also undermine environmental protection by setting the threshold for criminal conduct so low that it will chill or discourage educated and capable people from serving in a corporate environmental capacity.

REASONS FOR GRANTING THE WRIT

The Petition presents an important question of federal law – whether prosecutors may use the responsible corporate officer doctrine in felony prosecutions of environmental crimes, which effectively would eliminate the government's burden of proof as to the required *mens rea* element of these violations, and subject corporate officers to strict liability for felony offenses simply by virtue of their corporate positions. This issue has never been specifically addressed by this Court and, as the Petitioner notes, the Circuit Courts of Appeal are in conflict. Pet. 24. Accordingly, guidance from this Court is needed to settle this important question.

I. THE COURT OF APPEALS MISAPPLIED THE RESPONSIBLE CORPORATE OFFICER DOCTRINE

A. The Responsible Corporate Officer Doctrine Only Applies to Misdemeanor Violations of Public Welfare Legislation Where Punishment Is Light

Traditionally, our laws have required a showing that a defendant charged with a crime has performed a wrongful act with a wrongful intent: "an evil-meaning mind" and "an evil-doing hand." *See Morissette v. United States*, 342 U.S. 246, 251 (1952). The responsible corporate officer doctrine is an exception to the rule. Under this doctrine, a corporate officer may be held criminally liable even if the officer did not personally participate in a wrongful act, if his position and authority empowered him to prevent or correct the conduct which

gave rise to the violation. *Dotterweich,* 320 U.S. at 281.

In *Dotterweich*, the president of a pharmaceutical company was prosecuted for shipping adulterated and misbranded drugs in violation of the Federal Food, Drug and Cosmetic Act (FFDCA). 21 U.S.C. § 331. Although the adulteration of the drugs was found to have been accidental, the defendant's conviction was affirmed. Balancing the relative interests and burdens, this Court stated:

> Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.

320 U.S. at 284-85.

Thirty years later, in *United States v. Park*, this Court once again reviewed a CEO's conviction for adulteration under the FFDCA. The CEO of a retail grocery chain admitted to having received notice from the Food and Drug Administration of unsanitary conditions at one of the company's food warehouses after officials inspected the building. There also was evidence that two later inspections revealed that the unsanitary warehouse conditions had not been corrected. 421 U.S. at 661-62, 664. Because the CEO was in a position to have

prevented the violation, this Court affirmed the CEO's conviction, stating:

> [T]he Act imposes not only a positive duty to seek out and remedy violations when they occur, but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance impose on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.

421 U.S. at 672.

Central to the Court's decision to affirm the convictions in *Dotterweich* and *Park* was its finding that the FFDCA violations at issue were "public welfare" offenses. The hallmarks of a public welfare offense are unmistakable under FFDCA: Congress eliminated the government's requirement to prove that the defendant acted with criminal intent.[4] But, so as not to offend notions of due process, Congress denominated the offenses as misdemeanors with only light jail terms possible. The

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[4] As the Court noted in *Park*, in 1948 the Senate passed an amendment to the FFDCA, which would impose criminal liability only for violations committed "willfully or as a result of gross negligence." The amendment, however, was stricken in conference, confirming Congress' intent to eliminate any *mens rea* requirement. 421 U.S. at 672, n.15.

Court has repeatedly identified these same two hallmarks – no mens rea requirement and light jail time – in upholding public welfare offense convictions. *See, e.g., Morissette*, 342 U.S. at 256 ("[P]enalties commonly are relatively small, and conviction does no grave damage to an offender's reputation"); *Staples v. United States*, 511 U.S. 600, 617-18 (1994) ("[T]he cases that first defined the concept of the public welfare offense almost uniformly involved statutes that provided for only light penalties or short jail sentences. . . . [A] severe penalty is a further factor tending to suggest that Congress did not intend to eliminate a *mens rea* requirement").

The FFDCA public welfare offenses at issue in *Dotterweich* and *Park* had no *mens rea* requirement; they were misdemeanor violations; and carried only light jail terms or fines for a conviction. *Dotterweich* and *Park* do not legitimize use of the responsible corporate officer doctrine for prosecuting felony offenses, particularly those with express *mens rea* requirements and the possibility of lengthy prison sentences. Yet, the Eleventh Circuit endorsed the use of the responsible corporate officer doctrine in convicting Randall Hansen of "knowing" violations of RCRA and CWA felony provisions which, under the U.S. Sentencing Guidelines, carry mandatory multi-year prison sentences.[5] As discussed below, the

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[5] Prior to the adoption of the U.S. Sentencing Guidelines in 1987 requiring determinate sentencing, the normal practice was that a defendant receiving a sentence of more than one year would be eligible for parole after serving one-third of the sentence. 18 U.S.C. § 4205(a) (1987). Congress abolished the practice of parole with the use of determinate sentencing under the U.S. Sentencing Guidelines. Sentencing Reform Act of 1984, Pub. L. 98-473, tit. II, § 218(a)(5),

inappropriateness of the responsible corporate officer doctrine is most glaring in the case of the RCRA "knowing endangerment" offense.

B. The *Mens Rea* Language of the RCRA "Knowing Endangerment" Felony Provision and its Fifteen-Year Maximum Sentence are Incompatible with the Responsible Corporate Officer Doctrine

Enacted in 1976, RCRA sets forth a detailed scheme for the cradle-to-grave management of hazardous wastes. 42 U.S.C. §§ 6901-6992k(1994). A facility must obtain a RCRA permit to perform almost any activity involving management of hazardous waste. RCRA prohibits a person from "knowingly" storing, treating, disposing, or transporting any hazardous waste without a permit or in violation of any existing RCRA permit condition. 42 U.S.C. § 6928. Such "knowing" violations are felonies, punishable by fines of up to $50,000 for each day of violation, and imprisonment of up to five years, or both. *Id.*

In the present case, the trial court permitted the use of the responsible corporate officer doctrine to convict Randall Hansen not only of RCRA violations requiring "knowledge," but also of the much more serious charge under RCRA of "knowing endangerment," which carries potential fines of up to $250,000 and imprisonment of up to fifteen years. 42 U.S.C. § 6928(e). RCRA defines

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98 Stat. 2027 (1984) (repealing 18 U.S.C. § 4205 as of Nov. 1987). Thus, Randall Hansen's 46-month sentence is comparable to a pre-guideline sentence of a staggering 138 months, or *11 1/2 years*.

knowing endangerment as having occurred only where "a person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste," in violation of 42 U.S.C. § 6928(d), also "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." *Id.* So as to leave no doubt about the mental state required to convict a defendant of knowing endangerment, Congress provided "special rules" to govern the knowing endangerment provision. *See* 42 U.S.C. § 6928(f). Among these special rules is the following, which can only be read as prohibiting application of the responsible corporate officer doctrine:

> In determining whether a defendant who is a natural person knew that his conduct placed another person in imminent danger of death or serious bodily injury – (A) the person is responsible only for *actual* awareness or actual belief that he possessed; and (B) *knowledge possessed by a person other than the defendant but not by the defendant himself may not be attributed to the defendant.*

42 U.S.C. § 6928(f)(2)(A)-(B) (emphasis added).

Notwithstanding the clear statutory requirement that a defendant must have "*actual* awareness" that his conduct placed another in imminent danger of death or severe injury, and the further statutory proviso that such actual awareness cannot be attributed or imputed to a defendant, the Eleventh Circuit found no error in the "responsible corporate officer" instruction that the district court gave the jury. Under that instruction, the jury could convict Randall Hansen of knowing endangerment even if they

concluded he did not have "actual awareness" of the danger to workers posed by mismanagement of hazardous waste. Thus, Randall Hansen was convicted of a felony, ordered to pay a $20,000 fine, and sentenced to 46 months in prison – not because he had "actual awareness" of an endangerment, but because he had the misfortune of being a corporate officer for a bankrupt company. Pet. App. 14a, 59a; R14-235-12, 13. Such a result is not only contrary to the statutory language of RCRA, but it is also at odds with this Court's prior articulation of the circumstances in which it is proper to use the responsible corporate officer doctrine.

The Eleventh Circuit's misapplication of the responsible corporate officer doctrine can perhaps be attributed to uncertainty over the contours of the public welfare offense doctrine. Justice Thomas commented on the vagaries of the public welfare doctrine in his dissent from the denial of certiorari in *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting). In *Hanousek*, the defendant supervisor was sentenced to one year imprisonment for "negligently violating" the Clean Water Act because an independent contractor, hired by the supervisor's employer, accidentally punctured a pipeline, releasing a small amount of oil into a nearby river. Justice Thomas urged this Court to reexamine the contours of the public welfare doctrine in view of "the Court of Appeals' overly broad interpretation of this doctrine." *Id.*

The government's use of the responsible corporate officer doctrine to prosecute Randall Hansen for "knowing endangerment" – a felony for which a 15-year prison sentence is possible – announces a new era in prosecution of environmental crimes and cries out for redress by this

Court. The time has come for this Court to step in and clarify the circumstances under which the government may convict a corporate official of criminal offenses without having to prove criminal intent, and the necessity of ensuring that sufficient evidence was presented to the jury to prove the existence of *mens rea* beyond a reasonable doubt.

II. IF ALLOWED TO STAND, THE COURT OF APPEALS DECISION WILL IMPOSE UNJUSTIFIED RISKS ON CORPORATE MANAGERS TO THE DETRIMENT OF THE PUBLIC INTEREST

No less than the former Assistant Administrator for the EPA Office of Solid Waste, Donald Clay, has concluded that understanding the Nation's hazardous waste laws is beyond the grasp of all but a handful of career bureaucrats working for EPA:

> RCRA is a regulatory cuckoo land of definition . . . . I believe we have five people in the agency who understand what "hazardous waste" is. What's hazardous one year isn't -- wasn't hazardous yesterday, is hazardous tomorrow, because we've changed the rules . . . . You have a waste that in one state is hazardous and in another isn't because they haven't adopted a rule yet. It is a legal statutory framework rather than logical, based on concentration and threat type of thing.

United States v. White, 766 F. Supp. 873, 882 (E.D. Wash. 1991).

Given the complexity of RCRA, no CEO of a large company could be expected to maintain expertise in RCRA and provide direct oversight of compliance with its provisions while simultaneously discharging a CEO's duty to run the company. CEOs have no choice but to delegate responsibility for RCRA compliance to corporate environmental managers. Under the responsible corporate officer doctrine, however, delegating responsibility is no defense; a responsible corporate officer can be convicted without knowledge that a specific violation is occurring. Thus, to expand the *Park/Dotterweich* doctrine to RCRA felonies, as the prosecution here urged and the trial court allowed, would usher in a whole new level of risk -- untenable risk -- for corporate managers.

If the Eleventh Circuit's decision is allowed to stand, corporate managers for industrial businesses may want to rethink their career choice. As some commentators have observed, applying the responsible corporate officer doctrine to prosecution of environmental felony offenses, in effect, confers "designated felon" status on industrial business managers. *See* Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?*, 25 LOY. U. CHI. L. J. 169 (1994). To borrow a phrase from the dissent in *United States v. Weitzenhoff*, it would impose on these officers "a massive legal risk, unjustified by law or precedent." 35 F.3d 1275, 1299 (9th Cir. 1994) (Kleinfeld, J., dissenting), *cert. denied*, 513 U.S. 1128 (1995). Amici urge this Court to grant certiorari and make it clear that the responsible corporate officer doctrine cannot be used to support convictions under statutes that require proof of criminal intent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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